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No. 06-1284

Supreme Court, U.S.
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In The

Supreme Court of the United States

USF-RED STAR EXPRESS, INC.,

Petitioner,

v.

EDWIN B. TAYLOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

This case, and the other Circuit cases with which it conflicts, literally involve public safety on the nation's highways and potentially life-threatening situations where workers operate heavy duty forklifts at relatively high speeds to move tons of freight.[1] It warrants this Court's consideration.

Taylor's response (the "Response") to Red Star's Petition for Writ of Certiorari (the "Petition") focuses almost exclusively on the merits of the Third Circuit's decision below, and not on whether this case is worthy of certiorari.[2] Specifically, Taylor ignores that various aspects of the Third Circuit's decision conflict with this Court's precedent and with decisions of the Second, Seventh, and Eighth Circuits. Taylor glosses over the fact that the Third Circuit's decision is exactly contrary to recent decisions of the Seventh and Eighth Circuits handed down under extremely similar facts.

Taylor's merits-based arguments, moreover, do not provide any reason to deny certiorari. Taylor argues that the same decisions would have been reached even if the Third Circuit had applied the appropriate standards (*e.g.*, because the errors in the jury charge were harmless). Taylor's merits arguments are deeply flawed. More importantly, however, Taylor misunderstands this Court's role and that his arguments are irrelevant to any issue that will be before the Court. Taylor's arguments do not relate to any of the Questions Presented in the Petition, and Taylor did not cross-petition for

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[1] Every relevant witness agreed, driving a forklift can be hazardous. (JA0216-220 (9/30/04 Tr. 135:16-139:7); JA0612-618 (10/5/04 Tr. 65:18-71:4); JA0892 (10/6/04 Tr. 79:4-17); JA0900 (10/6/04 Tr. 87:10-20); JA01063-64 (10/6/04 Tr. 250:24-251:8); *see also* JA1500-1559 (D-92 – D-98) (government publications regulating forklifts because of inherent dangers, explicating dangers of working on or around forklifts, and tracking forklift injuries and deaths).)

[2] Taylor emphasizes that the Third Circuit's opinion was marked "Not Precedential." (Resp. at 1-2.) This, however, cannot insulate the decision from review by this Court and does not eliminate the conflicts with this Court's precedent and with other Circuit decisions detailed in the Petition.

review of these issues. It is the lower courts, therefore, and not this Court, that will decide these questions in the first instance if the Court grants certiorari and reverses. Thus, for the reasons set forth below and in the Petition, Red Star respectfully requests that the Court grant its Petition for Writ of Certiorari.

II. ARGUMENT

A. Taylor's Lengthy Factual Recitation Is Largely Irrelevant And Mischaracterizes The Record.

Taylor spends a great deal of time outlining facts that are allegedly supported by the record and relevant to this Court's decision on the Petition. (Resp. at 2-7.) Most of Taylor's discussion of the facts is irrelevant, however, and many of his allegations are completely unsupported by his record citations.

Taylor addresses facts related to whether driving a forklift was an "essential function" of his job and whether he could have performed the essential functions of the job with a "reasonable accommodation." (Resp. at 3-6.) These concepts, however, are distinct from the legal issues on which Red Star sought certiorari. (Pet. at i-ii). These facts, therefore, are irrelevant to this Petition.

Many of Taylor's allegations are also unsupported by the Record. For example, Taylor alleges that Red Star "affirmatively hid Mr. Taylor's medical evidence from its own doctor for more than a year" and that it "refused to permit him to work on the dock even after he had been fully released to operate *both* a fork lift *and* a truck." (Resp. at 5.) None of Taylor's record citations, however, support these accusations. Likewise, Taylor persistently argues that Red Star's position was fixed "regardless of what current medical evidence shows." (Resp. at 1, 7, 17.) Taylor's use of this inaccurate quote is grossly misleading. The quote is drawn from an email written by Red Star's president in response to Taylor's and the union's litigation position. A review of the email in context illustrates the absurdity of Taylor's characterization of the evidence. (JA01669 (P-57) ("We have neither the expertise nor the training to determine what caused Mr.

Taylor's seizures. . . . Do the medical experts now agree that Mr. Taylor has proven that he is no longer subject to seizures and that he no longer poses the risk, as a result of seizure(s) of inflicting injury or death upon himself or others?").) The Court should ignore Taylor's unsupported factual allegations and mischaracterizations of the evidence.[3]

B. The Third Circuit's Decision Conflicts With A Seventh Circuit Opinion Decided Under Nearly Identical Facts.

Red Star argued that certiorari should be granted because the Third Circuit's effective adoption of a new, more lenient standard to judge "regarded as" disability claims conflicted with this Court's and other Circuits' decisions. (Pet. at 15-19.) Taylor essentially ignores this argument and asserts that "[t]here is simply no 'Circuit split' to resolve." (Resp. at 12.) Taylor's bare denial, however, does not eliminate these conflicts. (Pet. at 15-19.) Indeed, the Third Circuit's decision conflicts directly with a Seventh Circuit case decided the same day the Petition was filed. *See EEOC v. Schneider Nat'l, Inc.*, __ F.3d __, No. 06-3108, 2007 WL 841035 (7th Cir. Mar. 21, 2007).

In *Schneider*, the Seventh Circuit addressed facts materially identical to those before the Third Circuit, but reached the opposite result. The plaintiff ("Hoefner") was a truck driver who was diagnosed with a condition that could cause him to faint. *Id.* at *1. Schneider's policy was not to employ anyone with this condition as a truck driver because it believed that the condition had caused a fatal accident involving one of its drivers. *Id.* Schneider fired Hoefner based on this policy, even though his condition was treatable and even though he was permitted to drive trucks under federal

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[3] Taylor argues that he is entitled to have factual disputes resolved in his favor. In reviewing "misleading or inadequate" jury instructions, however, "the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party." *Caballero v. City of Concord*, 956 F.2d 204, 207 (9th Cir. 1992).

law. *Id.* The EEOC then brought suit on his behalf alleging that Schneider had "regarded" Hoefner as disabled. *Id.* at *1.

Writing for a unanimous panel, Judge Posner rejected the EEOC's contentions. Unlike the Third Circuit, the Seventh Circuit correctly identified the standard applicable to "regarded as" disability claims:

> There usually and here are two issues to resolve in such a case. The first is whether the employer's decision to terminate or take some other adverse employment action against the employee was motivated by a mistaken belief that the condition precludes him from engaging in some activity. *If so, the second question is whether the activity that the employer mistakenly believes the employee to be disabled from engaging in is a "major life activit[y]."*

Id. at *1 (emphasis added). Based on this standard, the Seventh Circuit held that Schneider's refusal to accept the risk that Hoefner's condition *might* cause an accident did not establish that Schneider believed that he was disabled:

> Schneider is entitled to determine how much risk is too great for *it* to be willing to take. . . . The fact that another employer and, as in all such cases, the worker himself are willing to assume a risk does not compel the worker's current employer to do likewise.

Id. at *2 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999)).

The Seventh Circuit also rejected the EEOC's argument that the court should infer that Schneider "regarded" Hoefner as unable to drive "any type of truck for any type of trucking company," *i.e.* that he was substantially impaired in his ability to work. *Id.* at *3-4. The Seventh Circuit held that, even if:

> Schneider had exaggerated Hoefner's condition and mistakenly thought him disabled from a broad range of jobs even though he was not[,] . . . the EEOC would not have made its case, because Schneider's hypothetical admission would be consistent with the company's having decided to set a higher safety standard than law or custom

> requires. . . . As we know from *Sutton*, that is a decision the Act does not touch.

Id. at *5.

Schneider is directly contrary to the Third Circuit's opinion in this case. The Third Circuit ruled that evidence that Red Star was concerned for the risk that Taylor "*might* have another seizure and be a danger to the public" and "*could* be a threat to himself [and] others" demonstrated that Red Star believed Taylor was substantially impaired in a major life activity. (App. at 10 (emphasis added)). Under *Schneider*, however, this evidence would be insufficient to establish that Red Star regarded Taylor as disabled. This conflict between the Third and Seventh Circuits is another reason that this Court should grant certiorari.

Taylor also argues that he would have prevailed even if the Third Circuit had applied the appropriate standard. (Resp. at 12-15.) Taylor, however, mistakes this Court's function. If the Court grants certiorari and reverses, it will be the lower courts, and not this Court, that will decide in the first instance whether the evidence was sufficient to sustain the jury's verdict. Taylor's arguments, therefore, are both mistaken[4] and irrelevant to the certiorari question.

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[4] Taylor cites evidence that Red Star thought he was an epileptic, (Resp. at 13), but such evidence cannot prove a "regarded as" disability. (Pet. at 16.) Taylor asserts that Red Star believed he could not "go out of his home unattended," *etc.*, (Resp. at 13-14), yet, he does not cite any record evidence supporting this assertion and there is none. Taylor cites his expert's testimony, but ignores that the district court specifically excluded the use of the expert's testimony to prove Red Star's perception of Taylor. (JA00523 (10/4/04 Tr. 218:12-21).) Finally, Taylor cites the Social Security Administration's ("SSA") regulations for Disability Insurance Benefits. (Resp. at 14 n. 18.) These regulations are irrelevant here. *Cf. Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 804 (1999) (distinguishing disability under the SSA from the ADA). Further, there is no evidence that Red Star believed that Taylor had a disabling condition under the SSA regulations. *See* Appendix 1 to 20 C.F.R. § 404.1525 at §§ 11.02, 11.03, http://www.ssa.gov/OP_Home/cfr20/404/404-ap10.htm (epilepsy is disabling only when occurring more frequently than once a month (11.02) or once a week (11.03)).

C. The Third Circuit's Decision Conflicts With An Indistinguishable Eighth Circuit Decision.

Red Star argued that certiorari should be granted because the Third Circuit's resolution of Red Star's appeal regarding the reasonable mistake defense conflicted with the Eighth Circuit's jurisprudence addressing the relationship between medical evidence and "regarded as" disability claims. (Pet. at 19-22.) Taylor asserts that there is no circuit split, and then argues the merits of the Third Circuit's decision. (Resp. at 16-20.) Contrary to Taylor's argument, however, the Eighth Circuit's decisions are indistinguishable. Indeed, the facts in *Pittari v. American Eagle Airlines, Inc.*, 468 F.3d 1056 (8th Cir. 2006), bear an uncanny resemblance to those at issue here. Yet, the Third Circuit's decision is exactly opposite the Eight Circuit's.

In *Pittari*, the plaintiff ("Pittari") worked for the defendant ("American") as a flight attendant, a position the FAA classified as "safety sensitive." *Pittari*, 468 F.3d at 1058. American became concerned that Pittari's cognitive functions, and thus his ability to perform safety sensitive duties, might be impaired. *Id.* American, therefore, requested that a doctor examine Pittari. *Id.* The doctor found Pittari to be impaired, and American restricted Pittari from working as a flight attendant. *Id.* at 1059. At his request, Pittari was later retested by a new doctor. *Id.* The new doctor opined that Pittari could safely return to work, largely because he had performed the job in the past. *Id.* American was skeptical, however, and requested a copy of the new doctor's assessment of Pittari. *Id.* It concluded that the test results did not agree with the doctor's recommendation and refused to lift Pittari's work restrictions. *Id.* Pittari then requested a binding third-party medical evaluation. *Id.* This evaluation demonstrated that Pittari could perform his job safely, and American lifted Pittari's work restrictions. *Id.*

Pittari sued claiming that American had regarded him as disabled. *Id.* at 1059-60. A jury found for Pittari and American appealed. *Id.* at 1060. In granting American judgment as a matter of law, the Eighth Circuit reaffirmed

its precedent that work restrictions based on doctors' advice do not demonstrate a perception of disability:

> we repeatedly have recognized "the provision addressing perceived disabilities is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." *Restrictions based upon the recommendations of physicians are not based upon myths or stereotypes about the disabled and thus do not demonstrate a perception of disability.*

Id. at 1063 (emphasis added, citations omitted). Thus, the Eighth Circuit held that the defendant was insulated from liability for a "regarded as" disability claim even though it chose to follow its own doctor's recommendations and to question the plaintiff's doctor's recommendations until a third-party doctor opined that the plaintiff could safely perform his normal duties.

By contrast, the Third Circuit reached the opposite conclusion under materially identical facts.[5] Indeed, the Third Circuit ruled that Red Star lost its defense *because of* its reliance on the doctors' opinions. The Third Circuit rejected Red Star's defense that Taylor had promoted the misperception that he was an epileptic because: "there was evidence [that] Red Star's perception that Taylor had a serious epileptic condition . . . was not based on information from Taylor, *but on the assessments of doctors reporting to Red Star*." (App. at 12 (emphasis added).) Thus, the Court should also grant certiorari to resolve this conflict.

D. Taylor's Argument Regarding The District Court's Definition Of "Major Life Activities" Underscores Why Certiorari Should Be Granted.

Red Star argued that certiorari should be granted because the Third Circuit's endorsement of the definition of

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[5] For a discussion of the facts, *see* Red Star's Third Circuit Appeal Brief at 5-18.

"major life activities" as activities that "an average person can perform with little or no difficulty" conflicted with this Court's decision in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) and its progeny. (Pet. 13-15.)

Taylor responds that there is no conflict between the Third Circuit's decision and this Court's precedent because *Toyota* does not apply outside of cases involving the major life activity of performing manual tasks. (Resp. at 10 n. 15.) Taylor is mistaken. The Court's definition was based on the meaning of the word "major," which necessarily applies equally to all "*major* life activities." *See Toyota*, 534 U.S. at 197 ("'Major' in the phrase 'major life activities' means important. . . . 'Major life activities' thus refers to those activities that are of central importance to daily life.") Taylor's argument, moreover, highlights another reason certiorari should be granted. Like Taylor, the Third Circuit mistakenly believed that *Toyota* was limited to cases involving manual tasks. (App. at 8.) Indeed, Taylor suggests that "numerous Circuit Courts" have recognized that *Toyota* is so limited. (Resp. at 10 n. 15.) The Court should grant certiorari to clarify that *Toyota*'s definition applies to all purported "major life activities."

Taylor also argues that certiorari should be denied because any error was harmless. This argument is irrelevant.[6] Neither court below decided whether the challenged jury charges were harmless because they concluded that they were not erroneous. (App. 8-9, 29-30.) If this Court grants certiorari and reverses, therefore, it will be the lower courts, and not this Court, that will decide in the first instance whether the error was harmless.

E. The Third Circuit's Decision Effectively Eliminates A Statutory Defense And Conflicts With Other Circuit Precedent.

Red Star argued that certiorari should be granted because the Third Circuit's decision – that it was proper to

[6] Taylor's arguments are baseless. *See* Red Star's Third Circuit Appeal Brief at 24-28; Red Star's Third Circuit Response/Reply Brief at 4-9.

instruct the jury that there was no dispute that Red Star kept Taylor out of work "because of his medical condition," even though Red Star argued throughout trial that it kept Taylor off the job because the doctors had not cleared him to drive safely – effectively eliminated the direct threat defense and conflicted with other circuits' precedent. (Pet. at 22-25.) Taylor argues that certiorari should be denied for two reasons. (Resp. at 20-24.)

First, Taylor argues that the Petition seeks an advisory opinion because Red Star did not raise a direct threat defense. (*Id.* at 21.) Red Star, however, did not request this Court to provide any ruling on the direct threat defense. (Pet. i-ii.) Rather, Red Star cited the direct threat defense to highlight the public policy consequences of the Third Circuit's decision, which effectively limits the applicability of the defense, as a reason for this Court to grant certiorari. (*Id.* at 23-24.)

Second, rather than addressing Red Star's argument that the Third Circuit's decision created a circuit split, Taylor once again makes a merits argument, claiming that certiorari should be denied because the "question before the Third Circuit was intensely factual," and because "[t]he District Court gave the best and most neutral instruction which it was possible to give without siding with either party." (Resp. at 22-23.) As discussed above, Taylor's argument misunderstands this Court's function and is premature and irrelevant.[7]

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[7] Taylor is also wrong. The district court did not give the "most *neutral* instruction" possible. (Resp. at 22-23) (emphasis added). Its charge directed the jury to decide in Taylor's favor an issue that his lawyers characterized as "*the* issue in the case." (JA01251 (10/7/04 Tr. 174:7-12) (emphasis added); *see also* (JA01250-52 (10/7/04 Tr. 173:10-175:5) ("Those facts are in dispute."; "No, that is what the trial is about. I do not agree with it.")).) Nor was the question before the Third Circuit "intensely factual." All that was required was to determine: (1) whether the issue was disputed, and if so, (2) whether it was erroneous to instruct the jury to decide that issue in Taylor's favor. The first point can be decided from three pages of trial transcript, (JA01250-52 (10/7/04 Tr. 173:10-175:5)), and the second point is purely legal.

F. Certiorari Should Be Granted To Resolve The Conflict Between The Second And Third Circuits' Interpretations Of Rule 54(d)(2)(B).

Red Star demonstrated that the Third Circuit's construction of Rule 54(d)(2)(B) conflicts with the Second Circuit's interpretation. (Pet. at 25-26.) Taylor responds that there is no conflict between the Third and Second Circuits, and that the Third Circuit's decision was correct in any event.[8] (Resp. at 25-27.) Taylor is wrong.

The Third Circuit's decision conflicts with the Second Circuit's prior rulings. In the Second Circuit, *both* an initial fee motion *and* a supplemental fee motion must be filed within 14 days after a final judgment or the resolution of a motion that suspends the finality of the judgment. *Weyant v. Okst*, 198 F.3d 311, 315 (2d Cir. 1999). By contrast, although the Third Circuit recognized that an initial motion for fees must be filed within this time, it held that a supplemental fee petition is timely when "its timing [is] logical, despite the fact that it [is] filed more than fourteen days after any entry of judgment." (App. at 21.) These holdings are irreconcilable.[9]

Respectfully submitted,

Dated: May 2, 2007

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[8] Taylor argues that Red Star lacks standing to raise this issue, but Red Star clearly has standing to challenge the order requiring it to pay Taylor's attorneys' fees.

[9] Taylor's argument that his supplemental fee motion was timely is both irrelevant to this Petition and wrong. Taylor's motion was untimely because it was not filed within "14 days after entry of judgment." Fed. R. Civ. P. 54(d)(2)(B).